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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

LARRY G. HARDISON, ET AL.,
Respondents.

REPLY OF PETITIONER TO CONSOLIDATED BRIEF IN OPPOSITION

DICK H. WOODS
GEORGE E. FELDMILLER
STINSON, MAG, THOMSON,
McEVERS & FIZZELL
P. O. Box 19251
Kansas City, Missouri 64141
(816) 842-8600
Attorneys for Petitioner, Trans World Airlines, Inc.

Of Counsel:
RAYMOND R. FLETCHER, JR.
Vice President and General Counsel
JAMES J. MOLLENKAMP
Assistant General Counsel
Trans World Airlines, Inc.
Post Office Box 20126
Kansas City International Airport
Kansas City, Missouri 64195
(816) 891-7500

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-8080

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REPLY OF PETITIONER TO CONSOLIDATED BRIEF IN OPPOSITION

Petitioner, Trans World Airlines, Inc. ("TWA") has received a consolidated brief in opposition to its petition for a writ of certiorari submitted by Respondent, Larry G. Hardison ("Hardison").[1]

QUESTIONS PRESENTED

Hardison accepted TWA's statement of facts (Brief in Opposition, p. 4). Given that factual statement, no viable question could be raised concerning TWA's efforts

1. Other respondents to this petition include the International Association of Machinists and Aerospace Workers, International Association of Machinists and Aerospace Workers, District 142, and International Association of Machinists and Aerospace Workers, Local 1650 (hereinafter collectively referred to as the "union" or "unions"), who filed a companion petition for a writ of certiorari, No. 75-1385. Hardison's consolidated brief in opposition was directed at both TWA's and the union's petitions.

to accommodate Hardison. The statement of facts demonstrates that TWA had no intent to discriminate against either Hardison or his religion. Accordingly, TWA respectfully reiterates that the pertinent questions are those stated on pages 2 and 3 of its petition.

The Court's grant of certiorari in *Parker Seal Co.* v. *Cummins*, 516 F.2d 544 (6th Cir. 1975), No. 75-478, *cert. granted* ..... U.S. ....., 44 U.S.L.W. 3493, March 1, 1976, evidences the importance of the questions presented by this petition. However, contrary to Hardison's brief in opposition, the grant of certiorari in *Parker Seal* does not render this petition less meritorious. Indeed, the grant of certiorari in this case would present the Court a more comprehensive and complete factual context for deciding the vital constitutional and legal questions concerning accommodation of religious beliefs.

REPLY ARGUMENT

I. This Petition Supplements Parker Seal Co. v. Cummins Thereby Presenting the Court a More Comprehensive and Complete Factual Basis for Deciding the Important Questions Presented.

Hardison concedes, as he must, the nationwide importance of the questions presented by the petition. He asserts, however, that the Court's grant of certiorari in *Parker Seal Co.* v. *Paul Cummins*, 516 F.2d 544 (6th Cir. 1975), No. 75-478, *cert. granted* ..... U.S. ....., 44 U.S.L.W. 3493, March 1, 1976, preserves TWA's constitutional argument so that, "there need not be a duplication of this Court's time in deciding the same question," (Brief in Opposition, pp. 11-12).

TWA respectfully submits that, contrary to Hardison's suggestion, the granting of certiorari in this case in addition to *Parker Seal* would present the constitutional issues to the Court in a more comprehensive and complete factual setting than an argument based solely on *Parker Seal's* facts.

Not only is the constitutional question of nationwide importance, but also because of the substantial impact the accommodation requirement has on collective bargaining agreements negotiated pursuant to important federal statutory schemes such as the Railway Labor Act (45 U.S.C. 151 et seq.) and the National Labor Relations Act (29 U.S.C. 151 et seq.), it is important that the Court review the standard established by the court below for determining whether an employer can reasonably accommodate the diverse religious practices of its various employees. Because *Parker Seal* does not present a factual setting involving the proper relationship of religious accommodation to such other important federal legislation, this case enables the Court to consider what that proper relationship ought to be in the context of a nondiscriminatory seniority system which does not lock-in the effects of past discriminatory conduct. Illustratively, because the court of appeals decision, as recognized by Hardison (Brief in Opposition, p. 10), establishes a discrimination by effect standard, it is important for this Court to determine whether that standard is appropriate in the religious discrimination area of Title VII given the applicability of the First Amendment and the existence of large industrial labor forces that are governed by seniority systems and other uniform work rules which, in the language of 203(h) of Title VII, 2 U.S.C. § 2000e-2(h), ". . . are not the result of an intention to discriminate because [of] . . . religion." See generally Ed-

wards and Kaplan, *Discrimination and the Rule of Arbitration Under Title VII,* 69 Mich.L.Rev. 599 (1971).

Unlike the Parker Seal Company, TWA is required, without union consent, to ignore an admittedly nondiscriminatory seniority system even though Hardison voluntarily transferred, to suit his own convenience, from a job assignment where he could observe his religious practices to one where he knew he would not have sufficient seniority to do so. Hardison thus used the seniority system to bump into a desired job position. Then, solely because of his religion, he, in effect, used the power of the state to compel TWA to grant him extraordinary employee rights to the detriment of other more senior employees. Thus, the question of the appropriate role of individual compromise is squarely presented by this petition.

To follow the court of appeals decision, the large industrial employer would undoubtedly have to discriminate against employees with differing or no religious views. In granting such preferential treatment, the employer would run afoul of the thrust of *McDonald* v. *Santa Fe Transportation Company, et al.*, 44 U.S.L.W. 5067 (June 25, 1976) that all discrimination in employment is a matter of national concern. Thus, far from enhancing less discrimination in employment, the court of appeals' decision not only creates more discrimination but also raises inevitable questions concerning which religion must be preferred. For this important reason, review of this petition is essential.

Another factual reason requiring the grant of certiorari is that, in sharp contrast to many religious discrimination cases under Title VII, TWA made every effort to accommodate Hardison's religious beliefs. Indeed, the district court not only was "impressed with the men who were on the line handling the problem" (Petition, Appendix D, p.

A64), but it also found that, "it would have been an undue hardship for TWA to have changed plaintiff's shift in violation of the seniority provision of the labor-management contract" (Petition, Appendix A, p. A27).[2]

The court of appeals' decision, as contrasted to *Parker Seal,* renders it virtually impossible for a large employer to establish that it could not reasonably accommodate the various religious practices of its many employees. Similarly, the court of appeals' decision requires an employer to incur the added expense of overtime wages or to do without coverage in other work areas. Thus, under the court of appeals' decision, the state is clearly requiring a private employer to incur added expense solely because of an employee's religious beliefs. This additional factual background ought to be before the Court in the determination of such important constitutional and legislative questions.

The records in both *Parker Seal* and this case are not voluminous. There would be little, if any, duplicative efforts required by the Court in a review of both cases. On the other hand, the benefit of having a more comprehensive and complete factual background would be substantial. Further, Supreme Court Rule 43(5) provides that two or more cases, involving the same question, may, on the Court's own motion or by special permission be argued together.

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2. The court of appeals, while stating that it relied heavily upon the findings of the district court, paradoxically held only against TWA even though TWA consented to an alteration of the seniority system. Moreover, it was TWA that initiated meetings with both Hardison and the Union in the effort to obtain a second accommodation after Hardison made his voluntary shift transfer (Tr. App. 268).

II. Replying to Respondent's Point 1, the Court of Appeals' Decision Requires an Employer to Breach, Without Union Consent, a Nondiscriminatory Collective Bargaining Agreement Which Did Not Lock in Past Discriminatory Conduct Thereby Creating Nationwide Problems in the Administration of Uniform Work Rules.

The court of appeals asserted that TWA could have (i) assigned a supervisor or another worker on duty elsewhere to replace Hardison on his Sabbath giving him a four-day work week; (ii) held a worker over from the last shift or assigned a worker from other work areas, or (iii) arranged and permitted a swap. In contrast, the district court explicitly rejected the first two because, "Both of those solutions would have created an undue burden on the conduct of TWA's business. Title VII cannot be interpreted to require that companies finance employees' religious beliefs." (Petition, Appendix A, p. A27). With respect to the latter possibility, the district court found, ". . . this case is a perfect example of a situation in which *a union* could accommodate a member if required to do so. *TWA agreed* that plaintiff could change shifts if the union approved" (Petition, Appendix A, p. 7, emphasis added). The court of appeals did recognize that its final alternative would create a conflict with the nondiscriminatory seniority system by declaring that "[i]t would seem that a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances . . . is prima facie evidence of union and employer culpability. . . ." (Petition, Appendix B, p. A43).

The approach of the court of appeals thus requires employers to ignore, abridge or breach the bona fide collective bargaining rights of other employees. Union employees across the nation have been dispossessed of uniform work rules because employers must now discriminate in favor of Sabbatarians or other religious sects, who might oppose many uniform work rules including, for example, the payment of union dues. *Cf. Yott* v. *North American Rockwell,* 501 F.2d 398 (9th Cir. 1974). That the foundation of important federal labor regulatory schemes has been severely disrupted by the decision below is illustrated by the petition for certiorari filed by the respondent Unions despite the court of appeals freeing them of liability.

Ironically, Hardison as much as concedes that the problem of tampering with the seniority rights of other employees effectively shackled TWA from further accommodation efforts by his assertion that *Franks* v. *Bowman Transportation Co.,* 44 U.S.L.W. 4356 (March 23, 1976) decided the issue of whether the duty of accommodation was affected by a seniority system. Contrary to Hardison's assertion, *Franks* is not controlling because it dealt only with the "making whole" of employees who suffered the effects of a pattern of past racial discrimination. *Franks* did not, of course, concern a bona fide seniority system that admittedly and by court finding was nondiscriminatory toward any religion and one that did not lock in the effects of past discrimination. Further, *Franks* was not at all concerned with the applicability of the First Amendment. A religious discrimination case must be governed by standards far different from those set forth in *Franks.* See generally *Can the Government Require Accommodation of Religion at the Private Job Site,* 62 Va.L.Rev. 237 (1976)[3] and Edwards and Kaplan, *supra.*

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3. This recent development article criticizes the decisions of the courts of appeal in both *Parker Seal* and *Hardison.* The author concludes that the accommodation requirement finds, "little justification in establishment clause jurisprudence . . . [n]or is the accommodation supported by an overriding secular government interest. Not even historical practice supports the rule. Consequently, it breaches the governmental neutrality on questions of religion required by the first amendment." *Id.* at 257. See also n. 130 at 257-258.

CONCLUSION

TWA respectfully submits that this petition for certiorari should be granted, and a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

STINSON, MAG, THOMSON, MCEVERS & FIZZELL

By DICK H. WOODS

By GEORGE E. FELDMILLER

P. O. Box 19251
Kansas City, Missouri 64141
(816) 842-8600

Attorneys for Petitioner, Trans World Airlines, Inc.

Of Counsel:

RAYMOND R. FLETCHER, JR.
Vice President and General Counsel

JAMES J. MOLLENKAMP
Assistant General Counsel

Trans World Airlines, Inc.
Post Office Box 20126
Kansas City International Airport
Kansas City, Missouri 64195
(816) 891-7500

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